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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

THERESE A. BURKE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether payments received in settlement of back-wage claims under Title VII of the Civil Rights Act of 1964 are excluded from the claimant's gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)).

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THERESE A. BURKE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 929 F.2d 1119. The opinion of the district court (App., *infra*, 18a-34a) is unofficially reported at 90-1 U.S.T.C. ¶ 50,203.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 35a-36a) was entered on April 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 104 of the Internal Revenue Code, 26 U.S.C. 104, provides in pertinent part:

Compensation for injuries or sickness

(a) **In general.**

Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

* * * * *

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

* * * * *

STATEMENT

1. Respondents are employees of the Tennessee Valley Authority (TVA) and members of the Office and Professional Employees International Union, AFL-CIO (OPEIU).[1] In 1984, Judy Hutcheson, a TVA employee, filed an action alleging that TVA had engaged in unlawful sex discrimination in the payment of salaries, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* OPEIU intervened in the action in its representational capacity on behalf of respondents and other employees of TVA. App., *infra*, 2a.

Hutcheson and OPEIU alleged that TVA discriminated against female employees in 1981 when it increased the salaries of employees in male-dominated

[1] Respondents are Therese A. Burke, Cynthia R. Center, and Linda G. Gibbs.

pay schedules and either left salaries of employees in female-dominated pay schedules unchanged or lowered them (App., *infra*, 2a-3a). The complaint alleged that TVA had "a policy and practice of unlawful, gender-based discrimination with respect to salary" and that its conduct was "intended to and did result in disparate treatment of its female employees in their rates of pay in violation of Title VII of the Act" (*id.* at 20a, 22a). The plaintiffs sought an order restraining further discrimination and "a further order awarding back pay to all affected female employees * * * in an amount * * * sufficient to eliminate discrimination" (*id.* at 3a, 22a).

TVA filed a counterclaim against OPEIU alleging fraud, misrepresentation, breach of contract, and interference with contractual relationships. After the plaintiffs' claim and TVA's counterclaim survived motions for summary judgment, the parties settled the case. App., *infra*, 3a. Pursuant to the settlement, TVA agreed to pay $4,200 to Hutcheson and a total of $5,000,000 to affected TVA employees under a formula based on length of service and rates of pay (*id.* at 3a, 23a).[2] It was stipulated, however, that TVA would distribute the settlement funds to individuals only after it first withheld all applicable federal income taxes and FICA (social security) taxes from the payments (*id.* at 25a).[3]

[2] The settlement agreement provides that settlement payments are to be made to all affected persons who were employed "at any time between June 28, 1981, through and including March 10, 1987" (App., *infra*, 25a). The agreement further provides that the amounts to be paid to the affected employees "will be based upon pay rates and length of service * * * during the above period" (*id.* at 23a).

[3] The settlement agreement provides that "TVA will pay at OPEIU's direction a sum not to exceed $5,000,000, less any

Based upon their lengths of service and rates of pay, respondents Burke, Carter and Gibbs were entitled to receive, respectively, $764.94, $927.55, and $572.95 under the settlement agreement. TVA withheld federal income tax and FICA tax from these amounts and remitted the taxes to the United States. App., *infra*, 25a. The net balance of the settlement amounts was then paid to respondents (*id.* at 4a).

2. Respondents filed claims for refund with the Internal Revenue Service for the taxes withheld from the settlement payments. The Internal Revenue Service disallowed the claims. Respondents then commenced this refund action in the United States District Court for the Eastern District of Tennessee, claiming that the settlement payments should be excluded from their gross incomes under Section 104 (a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)). The district court rejected respondents' claims (App., *infra*, 18a-34a). The court observed that several courts have held that Title VII back pay awards do not constitute damages for "personal injuries or sickness" (*id.* at 31a-34a, citing, *e.g.*, *Thompson* v. *Commissioner*, 866 F.2d 709, 712 (4th Cir. 1989); *Hodge* v. *Commissioner*, 64 T.C. 616, 618-620 (1975)) and that the complaint in the underlying Title VII action "makes it clear that the very core of the case was the recovery of wage deficiencies" (App., *infra*, 32a). Finding that the plaintiffs had "tacitly accepted that the sums to be received under the Settlement Agreement were in the nature of back pay" (*id.* at 34a), the court concluded that the amounts received by respondents were not excludable from gross income under Section 104(a)(2) (App., *infra*, 34a).

3. A divided court of appeals reversed (App., *infra*, 1a-17a). The panel majority stated that the question "whether the § 104(a)(2) exclusion applies requires an examination of the nature of the injury to determine whether the injury and claim are personal and tort-like in nature" (*id.* at 6a). The court concluded that a sex discrimination claim is "tort-like in nature" because "injuries resulting from invidious discrimination, be it on the basis of race, sex, national origin or some other unlawful category, are injuries to the individual rights and dignity of the person" (*ibid.*). The court of appeals had previously held in *Pistillo* v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990), that an award of back pay under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, constituted damages for "personal injuries or sickness" to be excluded from income under Section 104(a)(2). The court found no basis for distinguishing *Pistillo* from the present case (App., *infra*, 7a-11a) and thus concluded that "suits for unlawful discrimination under Title VII, like suits under the ADEA and other tort type suits, fall within the category of suits for injury to the person and that the damages resulting therefrom are properly excludable under § 104(a)(2)" (*id.* at 11a).

In dissent (App., *infra*, 12a-17a), Judge Wellford observed that "[t]he subject matter of the [underlying Title VII] suit was pay for work performed" (*id.* at 12a) and that respondents "obviously recovered amounts which would have been subject to income tax had they come to [respondents] in the normal course" (*id.* at 14). Judge Wellford noted (*id.*

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taxes which TVA may be required to pay because it is the employer of any person whom OPEIU may designate to receive a portion of said sum" (App., *infra*, 25a).

at 15a) that the Fourth Circuit had held in *Thompson* v. *Commissioner*, 866 F.2d 709 (1989), that a Title VII back pay award is not excludable under Section 104(a)(2) because "[t]he back pay award was simply recovery for earned, but unpaid, wages" and represented "compensation for services rendered" (866 F.2d at 712). Because Judge Wellford found the Fourth Circuit's analysis of this issue to be "both logical and compelling," he concluded that the "flawed analysis" of *Pistillo* should not be extended to this case (App., *infra*, 15a).

REASONS FOR GRANTING THE PETITION

The holding in this case that back pay awards under Title VII of the Civil Rights Act of 1964 are to be excluded from a taxpayer's gross income as "damages received * * * on account of personal injuries," within the meaning of Section 104(a)(2) of the Internal Revenue Code, directly conflicts with the decision of the Fourth Circuit in *Thompson* v. *Commissioner*, 866 F.2d 709 (1989). See also *Johnston* v. *Harris County Flood Control District*, 869 F.2d 1565, 1580 (5th Cir. 1989) (an award of back pay under Title VII "is not tax exempt"), cert. denied, 110 S. Ct. 718 (1990). The issue addressed in this case affects many thousands of individuals who have received, or who will receive in the future, back pay under Title VII and under other employment discrimination statutes. Unless the conflict is resolved by this Court, these individuals will receive disparate tax treatment based entirely upon the happenstance of their geographical location.

1. Section 104(a)(2) of the Code provides that gross income does not include "the amount of any damages received (whether by suit or agreement

* * *) on account of personal injuries or sickness." This provision was first enacted as Section 213(b)(6) of the Revenue Act of 1918, ch. 18, 40 Stat. 1066, to implement this Court's holding in *Doyle* v. *Mitchell Brothers Co.*, 247 U.S. 179, 183, 185 (1918), that amounts received from the "conversion" of capital assets into money represented "income" only to the extent that a "gain" was realized from the transaction. "Applying this decision, the Attorney General held in an opinion, dated June 27, 1918, that the proceeds of an accident insurance policy were not subject to tax, the conclusion being based upon the reasoning that the human body is a kind of capital and that the proceeds of the insurance policy represented a conversion of capital lost through injury." S. 1384, 2 C.B. 71, 72 (1920) (citing 31 Op. Att'y Gen. 304 (1918)). The rationale for the statute, which "intended to go no further" (S. 1384, 2 C.B. at 72), was thus that the type of harm to the human body that gives rise to recoveries of workmen's compensation or health insurance payments, or to damage awards for "such injuries or sickness," did not represent "income" as the term was then defined. H.R. Rep. No. 767, 65th Cong., 2d Sess. 9-10 (1918).[4] In the first ruling issued by the Internal

[4] Congress enacted Section 213(b)(6) because "[u]nder the present law it is doubtful whether [amounts received from health insurance, workmen's compensation or as damages on account of personal injuries] are required to be included in gross income." H.R. Rep. No. 767, 65th Cong., 2d Sess. 9-10 (1918). The Treasury initially had taken the position that amounts paid under accident insurance policies and amounts received in a suit for personal injury were includable in income (T.D. 2135, 17 Treas. Dec. Int. Rev. 39 (1915)) but then changed its view and ruled that "the proceeds of an accident insurance policy received by an individual on account

Revenue Service under this statute,[5] it was therefore concluded that, while non-physical injuries (such as alienation of affections) could be regarded in some sense as "personal" injuries, they are nonetheless not within the statutory exclusion from income because "the term 'personal injuries,' as used therein means physical injuries only." S. 1384, 2 C.B. at 71; see *id.* at 72.[6]

In 1922, however, only two years after its first ruling, the Service reconsidered whether recoveries for alienation of affections (and other non-physical injuries to personal rights) were taxable and ruled that, while they are not excluded from income by (what is now) Section 104(a)(2), they nonetheless do not represent "income" because, when an individual receives damages that merely compensate him for loss suffered to a "personal right," "it cannot be held that he thereby derives any gain or profit." S. 132, I-1 C.B. 92, 93 (1922) (citing *Eisner* v. *Macomber*, 252 U.S. 189 (1920)). Because there is no gain or

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of personal injuries sustained by him through accident" and "an amount received by an individual as the result of a suit or compromise for personal injuries sustained by him through accident" were *not* income (T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918)).

[5] The Internal Revenue Service was known at that time as the Bureau of Internal Revenue. For continuity of discussion, however, this petition refers to both the Bureau of Internal Revenue and the Internal Revenue Service as "the Service."

[6] While the Service thus rejected a claim that the tort of alienation of affections represented a "personal injury" within the scope of the statute, the Service recognized that "it is still possible that damages therefor might be measured in part by sickness resulting therefrom and, of course, the amount received on account of sickness would be exempt under the express language of the statute." S. 1384, 2 C.B. at 72.

profit in such compensation, such recoveries were thought not to represent "income within the meaning of the sixteenth amendment and the statutes enacted thereunder." I-1 C.B. at 93-94. Even though the exclusion from income afforded to compensation for "personal injuries or sickness" under (what is now) Section 104(a)(2) was not deemed applicable to compensation received for a non-physical injury to personal rights, the Service thus ruled that such compensation was not taxable because no "income" had resulted. I-1 C.B. at 93-94.

In 1955, however, this Court made clear that the term "income" is not limited to earnings and profits from labor and capital but includes all "accessions to wealth" from whatever source derived. See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). As a result, there is now no constitutional impediment to taxing personal injury damages. B. Bittker & L. Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 13.1.1, at 13-2 (2d ed. 1989). In *Glenshaw Glass*, however, the Court did not reject the Service's long-standing position that the recovery of damages for personal claims would not represent "income" under the Internal Revenue Code to the extent that such recoveries "correspond to a return of capital." 348 U.S. at 432 n.8, citing, *e.g.*, S. 132, I-1 C.B. at 92. Since the decision in *Glenshaw Glass*, the proper focus for the inquiry whether recoveries for non-physical injuries to personal rights are subject to tax is thus whether the recovery merely represents compensation, without "any gain or profit" (S. 132, I-1 C.B. at 93), for human "capital lost through injury" (S. 1384, 2 C.B. at 72). See *Commissioner* v. *Miller*, 914 F.2d 586, 590 (4th Cir. 1990); *Starrels* v. *Commissioner*, 304

F.2d 574, 576 (9th Cir. 1962) (Browning, J.) (the burden is on the taxpayer to establish that the recovery merely "restore[s] a loss of [personal] capital").[7]

The current judicial disagreement as to whether monetary recoveries for sex discrimination in the workplace are excluded from income by Section 104 (a)(2) is more easily resolved once the question is viewed from this proper historical perspective. See note 6, *supra*. Under the rationale that no "gain or profit" is realized when compensation is received for human "capital lost through injury," it is appropriate (for example) to recognize no taxable income from a recovery for defamation of one's character or for injury to one's "personal reputation." See, *e.g.*, *Hawkins* v. *Commissioner*, 6 B.T.A. 1023, 1024-1025 (1927). The receipt of monetary compensation in exchange for such lost "personal capital," which

[7] In 1983, the Ninth Circuit held in a case involving defamation that both physical and non-physical injuries are encompassed within the Section 104 exclusion. See *Roemer* v. *Commissioner*, 716 F.2d 693, 697. See also App., *infra*, 5a (adopting same reasoning). The only support offered for this holding in *Roemer* was that the 1922 Solicitor's Opinion had concluded that recoveries for non-physical injuries did not represent "income." See 716 F.2d at 697. As we have shown, however, the 1922 Solicitor's Opinion had instead observed that non-physical injuries were not encompassed within the statutory exclusion but were nonetheless not taxable to the extent that they merely compensate for a loss to human capital and represent no gain or profit. See S. 132, I-1 C.B. at 92. Although the Service has not formally acquiesced in *Roemer*, it no longer contends that only physical injuries are encompassed within Section 104. Instead, the focus of the inquiry is whether the nature of the recovery for a claim of non-physical injury compensates for a personal loss or represents an economic gain. See *Commissioner* v. *Miller*, 914 F.2d at 590.

merely makes "the plaintiff whole as before the injury" (*id.* at 1025), represents a transaction without gain or profit. *Ibid.* See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. at 432 n.8 ("[d]amages for personal injury are by definition compensatory only"). It is not supportable, however, to view the receipt of back wages (which would have been taxed as income if received currently during the course of actual employment) as compensation for lost "personal capital". Back wages do not compensate for a loss, but represent an "undeniable accession to wealth" (*id.* at 431) for the recipient. See Rev. Rul. 72-341, 1972-2 C.B. 32 (Title VII back pay award is includable in gross income); Rev. Rul. 75-64, 1975-1 C.B. 16 (back pay awarded under the National Labor Relations Act is includable in gross income); Rev. Rul. 72-268, 1972-1 C.B. 313 (amounts awarded as overtime compensation and unpaid minimum wages under the Fair Labor Standards Act are includable in gross income). To hold otherwise is to introduce into the tax law the anomaly that wages promptly received for work performed are taxable, while later-received increments prescribed by law as part of those wages are not taxable.

2. a. In the present case, respondents received payments from their employer as part of a settlement of an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Title VII action was based on an allegation that the manner in which the employer established salary schedules for different job categories resulted in gender discrimination in the payment of salaries. App., *infra*, 2a, 19a-20a. The only monetary relief sought in the underlying Title VII action, and the

only relief available in that action, was back pay.[8] Successful plaintiffs in a Title VII action may recover back pay in the amount of the differential between the salary received and the salary that would have been paid but for the discrimination (see *Rasimas* v. *Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984)), which is precisely what the plaintiffs sought here.[9] Because Title VII allows only "equitable" relief, however, it is well settled that general compensatory damages and punitive damages are not available under Title VII. *Walker* v. *Ford Motor Co.*, 684 F.2d 1355, 1363-1364 (11th Cir. 1982); *DeGrace* v. *Rumsfeld*, 614 F.2d 796, 808 (1st Cir. 1980). See *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989).

[8] Amounts received in settlement of a claim are treated for tax purposes as having the same character as the claim itself. *E.g.*, *Elrick* v. *Commissioner*, 485 F.2d 1049, 1058 (D.C. Cir. 1973); *Commissioner* v. *Murdoch*, 318 F.2d 414, 416 (3d Cir.), cert. denied, 375 U.S. 879 (1963); see *Lyeth* v. *Hoey*, 305 U.S. 188, 196 (1938) (amount received by taxpayer in settlement of will contest is treated in same manner as if "the contest had been fought to a finish and petitioner had succeeded").

[9] Some Title VII plaintiffs can recover an award of future lost earnings, *i.e.*, front pay, but this remedy generally is used only in cases where the employee-plaintiff was discharged and the statutory remedy of "reinstatement" (42 U.S.C. 2000e-5(g)) is not feasible. See, *e.g.*, *Shore* v. *Federal Express* Corp., 777 F.2d 1155, 1158-1160 (6th Cir. 1985). Since the court in a Title VII salary discrimination case can order the defendant to pay a non-discriminatory salary in the future, an award of front pay would seldom be appropriate. In any event, the plaintiffs here did not seek front pay, so no part of the settlement could represent front pay. A Title VII plaintiff can also recover a monetary award to account for lost fringe benefits such as vacation pay and pension benefits. See, *e.g.*, *Rasimas* v. *Michigan Dep't of Mental Health*, 714 F.2d at 626. The plaintiffs did not seek any such fringe benefits here. In any event, fringe benefits are not damages for personal injuries.

An award of back pay under Title VII thus does not constitute a recovery of "damages" that compensates for a personal loss. A demand for back pay under Title VII "is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy." *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969). See also *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir.), cert. denied, 404 U.S. 1006 (1971). Since a back pay award is not an award of damages that compensates for an injury to one's personal capital, but represents an "undeniable accession to wealth" in the form of deferred wages from services actually provided, it represents taxable income under *Glenshaw Glass* and the Service's consistent rulings. See 348 U.S. at 432 n.8; Rev. Rul. 72-341, *supra*.[10] See also *Social Security Board* v.

[10] The principle of compensation in the common law of torts is "that a person should be compensated fairly for injuries caused by the violation of his legal rights." *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978). Accordingly, mental and emotional distress caused by such a violation are compensable. *Id.* at 264. See *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 307 (1986) (compensatory damages may include "such injuries as 'impairment of reputation . . ., personal humiliation, and mental anguish and suffering'" (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974))). Yet compensatory damages for mental and emotional distress are not available under Title VII. See *DeGrace* v. *Rumsfeld*, 614 F.2d 796, 808 (1st Cir. 1980). The unavailability of tort-like remedies further indicates that a Title VII action is not an "action based upon tort or tort type rights" (Treas. Reg. § 1.104-1(c)), and that a back pay award under Title VII does not constitute damages for personal injuries excludable from income under Section 104(a)(2).

Nierotko, 327 U.S. 358, 363-366 (1946) (back pay awarded under the National Labor Relations Act represents taxable "wages" for purposes of the Social Security Act).

b. The injury suffered by respondents (and the injury for which they were compensated under Title VII) was an injury to their economic interests relating to the amount of their salaries. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) ("Title VII deals with legal injuries of an economic character"). In concluding that Title VII back pay does not constitute damages for personal injuries excludable under Section 104(a)(2), the Fourth Circuit observed in *Thompson* v. *Commissioner*, 866 F.2d at 712, that a Title VII back pay award is "simply recovery for earned, but unpaid, wages" and represents "compensation for services rendered."[11] The Tax Court had earlier reached that same conclusion in *Hodge* v. *Commissioner*, 64 T.C. 616, 619

[11] The taxpayer in *Thompson* received a back pay award under Title VII and the Equal Pay Act of 1963, 29 U.S.C. 206(d). See 866 F.2d at 710-711. The Equal Pay Act generally prohibits gender discrimination in the payment of salaries to employees doing equal work. Title VII's prohibition of employment discrimination is, of course, much broader than the "equal pay for equal work" requirement of the Equal Pay Act. The salary discrimination suffered by the taxpayer in *Thompson* was proscribed by both statutes. A prevailing employee is entitled to relief under both statutes so long as she does not receive overlapping relief for the same wrong. *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). Although the Fourth Circuit primarily referred to the Equal Pay Act in its discussion of why the back pay award was not excludable under Section 104(a)(2) (see 866 F.2d at 712), it recognized that the taxpayer also received back pay under Title VII and that the issue presented was "whether an award of back pay under the Equal Pay Act and Title VII * * * [is] excludable under section 104(a)(2)" (*id.* at 711).

(1975), observing that "[u]se of the adjective 'back' in the phrase 'back pay' indicates a recovery of wages which should have been paid but were not."[12] Wages are, of course, includable in an employee's gross income under Section 61(a)(1) of the Internal Revenue Code as "[c]ompensation for services." 26 U.S.C. 61(a)(1). The Fourth Circuit in *Thompson* thus correctly concluded that Title VII back pay represents wages that are includable in gross income rather than damages for a personal injury. See 866 F.2d at 712.

The conclusion of the Fourth Circuit in *Thompson* and the Tax Court in *Hodge* that Title VII back pay is not to be excluded from income is wholly in accord with the policies fostered by Title VII. The remedies available under Title VII are designed "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 418. A Title VII back pay award is thus designed to place the employee in the same economic position that she would have achieved had she not been discriminated against in the first place. If the employer had not discriminated against respondents in the present case, they would have received higher salaries, and those salaries would have been included in their gross incomes. Requiring respondents to pay taxes on their back pay

[12] The Tax Court has followed its decision in *Hodge* in several other cases holding that Title VII back pay is not excludable under Section 104(a)(2). *Thompson* v. *Commissioner*, 89 T.C. 632, 644-648 (1987), aff'd, 866 F.2d 709 (4th Cir. 1989); *Sparrow* v. *Commissioner*, 57 T.C.M. (CCH) 816, 819-821 (1989), appeal pending, No. 90-1151 (D.C. Cir.); *Coats* v. *Commissioner*, 36 T.C.M. (CCH) 1650 (1977). The Court of Claims has also held that Title VII back pay is not excludable under Section 104(a)(2). *Watkins* v. *United States*, 80-1 U.S.T.C. ¶ 9362 (Ct. Cl. 1980).

awards under Title VII simply puts them in the same position they would have held if they had not been discriminated against in the first place. See *Thompson* v. *Commissioner*, 866 F.2d at 712 ("[i]f the back pay award were excluded from gross income, Thompson would be placed at an advantage over her male co-workers, who presumably reported their total earned wages as gross income").

c. The decision in the present case conflicts directly with the Fourth Circuit's decision in *Thompson* v. *Commissioner* and with the holding of the Fifth Circuit in *Johnston* v. *Harris County Flood Control District* that back pay under Title VII "is not tax exempt" (869 F.2d at 1580).[13] The decision in the present case is, however, consistent with prior decisions of the Third and Sixth Circuits that held that back pay awards under the Age Discrimination in Employment Act, 29 U.S.C. 621-634 (ADEA), constitute damages for personal injuries that are excluded from income under Section 104(a)(2). *Pistillo* v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Rickel* v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990).[14] Although we disagree with the conclusions reached in

[13] In addition, in *Sears* v. *A.T. & S.F. Ry.*, 749 F.2d 1451, 1456 (10th Cir. 1984), cert. denied, 471 U.S. 1099 (1985), the court of appeals concluded that back pay awarded under Title VII is subject to tax and therefore allowed the award to be enhanced so that the employees would be in the same after-tax position they would have been in if the correct wages had been paid currently by the employer.

[14] In *Pistillo* and *Rickel*, the courts of appeals reversed Tax Court decisions holding that ADEA back pay was not excluded from income under Section 104(a)(2). *Pistillo* v. *Commissioner*, 57 T.C.M. (CCH) 874, 979-881 (1989), rev'd, 912 F.2d 145 (6th Cir. 1990); *Rickel* v. *Commissioner*, 92 T.C. 510, 521-522 (1989), rev'd, 900 F.2d 655 (3d Cir. 1990).

Pistillo and *Rickel*, we agree with the court of appeals that there is no valid basis for distinguishing the tax treatment of back pay under Title VII and under the ADEA (App., *infra*, 9a).

3. The question presented in this case has substantial recurring administrative importance because it affects the thousands of individuals who have received or will receive back pay under Title VII or under other federal employment discrimination statutes, such as the Age Discrimination in Employment Act and the Equal Pay Act.[15] The question of the proper income tax treatment of such back pay also has important collateral consequences in Title VII litigation. The Service has long ruled that Title VII back pay is to be included in gross income and that it constitutes "wages" subject to income tax withholding and FICA (social security) taxes. Rev. Rul. 72-341, 1972-2 C.B. 32. Courts in Title VII cases have taken into account the fact that back pay will be included in the recipient's gross income in fashioning the back pay award.[16] The question whether Title VII back pay is excluded from gross income

[15] In 1989, Congress added a new provision to Section 104(a) that states that the Section 104(a)(2) exclusion "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379. Since this provision applies only to punitive damages, which are not available under Title VII, the question presented in this case remains unaffected by the amendment.

[16] See note 13, *supra*; *Melani* v. *Board of Higher Education*, 652 F. Supp. 43, 48 (S.D.N.Y. 1986), aff'd mem., 814 F.2d 653 (2d Cir. 1987) (Table). See also *Gelof* v. *Papineau*, 829 F.2d 452, 455 (3d Cir. 1987) (ADEA back pay).

under Section 104(a)(2) thus has substantial continuing importance in Title VII litigation.[17]

In the absence of a decision from this Court resolving the conflict among the courts of appeals, the tax treatment of back pay awards, as well as the amount of the awards themselves, will differ based solely upon the happenstance of geography. Resolution of this recurring issue is needed to avoid continuing uncertainty and uneven application of the revenue laws and of the remedies under Title VII and other employment discrimination statutes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1991

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[17] In addition, employers need clarification of whether they are to withhold income and FICA taxes from back pay awarded under Title VII, as the Service's instructions require (see Rev. Rul. 72-341, 1972-2 C.B. 32), or whether such awards are exempt from tax and withholding requirements.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 90-5607

THERESE A. BURKE, CYNTHIA R. CENTER, LINDA G. GIBBS, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

On Appeal from the United States District Court for the Eastern District of Tennessee

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Decided and Filed April 5, 1991

Before: MERRITT, Chief Judge; JONES, Circuit Judge; and WELLFORD, Senior Circuit Judge.*

JONES, Circuit Judge, delivered the opinion of the court, in which MERRITT, Chief Judge, joined.

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* The Honorable Harry W. Wellford assumed senior status on January 21, 1991.

WELLFORD, Senior Circuit Judge, (pp. 11-16), delivered a separate dissenting opinion.

JONES, Circuit Judge. Three taxpayers, Therese A. Burke, Cynthia R. Center, and Linda Gibbs, appeal the decision of the district court that funds distributed to them as part of a settlement agreement resulting from an action under Title VII alleging sex discrimination were not excludable as "damages received on account of personal injuries or sickness" under 26 U.S.C. § 104(a)(2). As we find that injuries sustained in violation of Title VII are "personal injuries," and that damages resulting from such injuries are excludable from taxation under § 104(a)(2), we reverse.

I.

Taxpayers brought this action seeking refunds of federal income taxes and social security taxes withheld from payments taxpayers received from their employer in settlement of a Title VII sex discrimination action. Taxpayers were employed by the Tennessee Valley Authority ("TVA") and were members of the Office and Professional Employees International Union ("the union"). In 1984, Judy A. Hutcheson, another TVA employee, filed a Title VII action in the district court against TVA alleging unlawful discrimination in the payment of salaries based upon gender. The union subsequently joined the action in its representational capacity on behalf of certain employees of TVA, including the three taxpayers in the instant case.

In their second amended complaint, Hutcheson and the union generally alleged that the TVA had discriminated against female employees when, in 1981, it had increased the salaries of employees in certain

male-dominated pay schedules but did not increase salaries of employees in certain female-dominated pay schedules. Moreover, TVA allegedly lowered salaries in some female-dominated schedules. Plaintiffs sought the following relief:

> Plaintiffs pray for judgment against defendants and for an order of this Court restraining and enjoining defendants from further discrimination against women in the SB schedule in wages and salaries and for a further order awarding back pay to all affected female employees in the SB schedule in an amount found to be just and proper sufficient to eliminate discrimination, for costs and for attorney's fees, and for such other relief as may be warranted in the premises.

J. App. at 33-34.

TVA filed a counterclaim against the union alleging fraud, misrepresentation, breach of contract, conspiracy with intent to defraud TVA and interference with contractual relationships. This counterclaim sought damages in the range of $30,000,000.00 (including treble and punitive damages). After both parties' claims survived cross motions for summary judgment, the parties decided to settle. The settlement agreement ("settlement") provided for the dismissal of TVA's counterclaim; a direct payment of $4200.00 to plaintiff Hutcheson; the conduct of a new regional salary survey; an amendment to the TVA/Union bargaining agreement to provide a method of salary arbitration for the future; and a lump sum payment of $5,000,000.00 to be distributed "at [the union's] discretion." Later the union asserted that distribution of the funds to the more than 8000 anticipated recipients was administratively unfeasible.

Thus, an amended settlement agreement was entered into which provided that TVA would distribute the money directly to individuals designated by the union under a formula established by the union.

The formula established by the union took into consideration length of service in the affected salary schedule and rates of pay. TVA agreed to distribute the money, but only on the condition that it could withhold federal income tax and FICA tax from the payments. The union reluctantly agreed and the money was distributed. It is important to note that TVA did not tax its direct payment of $4,200.00 to Hutcheson. Nor did TVA tax the monies left over as undeliverable to named individuals which were turned over to the union. Further, those funds, when distributed by Union to other employees, were not taxed.

On December 6, 1988, Betty K. Adkins, Cathy Elaine Adkins, Edward Bailey and "more than 1,000 other persons" filed the instant tax refund action. Later plaintiffs filed a motion to amend their complaint and dismiss without prejudice all the plaintiffs except the three taxpayers named in this action. The motion was granted and the present action ensued.

II.

This appeal raises the question of whether damages received in a settlement agreement in a Title VII action for sex discrimination are excludable as damages for "personal injury" under Internal Revenue Code § 104(a)(2). Whether the lower court properly applied § 104(a)(2) to disputed funds is a question of law and reviewed *de novo*. *Threlkeld v. Commissioner*, 848 F.2d 81, 83 (6th Cir. 1988) (citing *Roemer v. Commissioner*, 716 F.2d 693, 696 (9th Cir. 1983)).

As a general rule, under the Internal Revenue Code, "gross income means all income from whatever source derived." 26 U.S.C. § 61(a). Thus, all accessions of wealth are presumed to be "gross income" unless the taxpayer can show that the accession falls within a specific exclusion under the I.R.C. *See Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955). Section 104(a)(2) provides that "gross income does not include . . . the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness. . . ." Several courts have held that for the purpose of § 104(a)(2), "personal injuries" means both physical and nonphysical injuries. *See Pistillo v. C.I.R.*, 912 F.2d 145, 148 (6th Cir. 1990) (injury involved age discrimination); *Rickel v. Commissioner*, 900 F.2d 655, 658 (3rd Cir. 1990) (age discrimination); *Bent v. Commissioner*, 835 F.2d 67, 70 (3rd Cir. 1987) (deprivation of first amendment rights); *Roemer v. Commissioner*, 716 F.2d 693, 697 (9th Cir. 1983) (defamation). Treasury regulations define a claim for personal injuries under § 104(a)(2) as one which is based upon "tort or tort-type rights." 26 C.F.R. § 1.104-1(c) (1990). Essentially, the "exclusion under § 104(a)(2) is that the income involved must derive from some sort of tort claim against the payor." *Glynn v. Commissioner*, 76 T.C. 116, 119 (1981).

We see the question presented to us in this appeal as a quite narrow one. In *Threlkeld v. Commissioner*, 87 T.C. 1294, 1299 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988), the entire tax court, in a 15-1 decision, held that the test for determining whether a specific damage award qualified for the § 104(a)(2) exclusion is as follows:

> Section 104(a)(2) excludes from income amounts received as damages on account of personal injuries. *Therefore, whether the damages received are paid on account of "personal injuries" should be the beginning and end of the inquiry. To determine whether the injury complained of is personal, we must look to the origin and character of the claim . . ., and not to the consequences that result from the injury.*

(emphasis added). In other words, determining whether the § 104(a)(2) exclusion applies requires an examination of the nature of the injury to determine whether the injury and claim are personal and tort-like in nature, and not whether the consequences of the injury resulted in an award of compensatory damages or damages for back pay. *See Pistillo v. C.I.R.*, 912 F.2d 145, 148-49 (6th Cir. 1990). Thus, our inquiry is limited to whether injuries resulting from sex discrimination in violation of Title VII are "personal injuries" for the purposes of § 104(a)(2).

Courts have long held that injuries resulting from invidious discrimination, be it on the basis of race, sex, national origin or some other unlawful category, are injuries to the individual rights and dignity of the person. *See, e.g. Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1986) (race discrimination, challenged under § 1981, is a fundamental injury to the individual rights of the person); *Thompson v. Commissioner*, 866 F.2d 709, 712 (4th Cir. 1989) (sex discrimination is an injury to the person); *cf. Wilson v. Garcia*, 471 U.S. 261, 277 (1985) (analogizing a violation of the Civil Rights Act of 1871 to a violation of the fourteenth amendment which sounds in tort as in injury to the person); *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1143 (4th

Cir. 1975) ("an action brought under statutes forbidding racial discrimination is fundamentally for the redress of a tort."); *Curtis v. Loether*, 415 U.S. 189, 195-96 n.10 (1974) (analogizing racial discrimination to a "dignitary tort."). This long-held view of the tort-like nature of the injury resulting from unlawful discrimination has led this court and others to the conclusion that damages resulting from an action for unlawful discrimination are "damages on account of personal injury" for the purposes of § 104(a)(2). *See, e.g. Pistillo v. C.I.R.*, 912 F.2d 155 (6th Cir. 1990) (injuries resulting from age discrimination in violation of the Age Discrimination in Employment Act are personal injuries for the purposes of § 104(a)(2); *Rickel v. Commissioner*, 900 F.2d 655, 662 (3rd Cir. 1990) (age discrimination is a tort-like personal injury for the purposes of § 104(a)(2)); *Metzger v. Commissioner*, 88 T.C. 834 (1987), *aff'd without opinion*, 845 F.2d 1013 (3rd Cir. 1988) (finding that damages pursuant to settlement agreement reached in sex and national origin discrimination suit based upon 42 U.S.C. §§ 1981, 1983, 1985(3), 1986 and 2000e, et seq. (Title VII) were damages for "personal injury" under § 104).

The government asks us to draw a distinction between injuries resulting from discrimination in violation of Title VII and other forms of discrimination that this and other courts have found to be personal injuries for the purposes of § 104(a)(2). In support of its position, the government argues that Title VII only provides for back pay damages, *Boddy v. Dean*, 821 F.2d 346, 352 (6th Cir. 1987) (Title VII does not provide for compensatory or punitive damages), and that the intent of those damages is to make the plaintiff economically whole, *Shore v. Federal Express*

Corp., 777 F.2d 1155, 1158-59 (6th Cir. 1985) (Title VII damages are to make plaintiffs whole for past discrimination by restoring the economic position plaintiff would have occupied absent discrimination). Thus, the government argues that since back pay damages simply compensate plaintiffs for income they would have received absent the discrimination, these awards are economic rather than "tort or tort type" damages and therefore, not excludable under § 104. *See Hodge v. Commissioner*, 64 T.C. 616, 620-21 (1975) (damages awarded for back pay in race discrimination suit are not excludable under § 104).

We find the government's position unconvincing because the government misapprehends the proper inquiry for determining excludability under § 104(a)(2). Contrary to the tax court's teaching in *Threlkeld*, the government focuses its analysis on the consequences of a Title VII violation (the payment of back pay for lost wages) rather than the personal nature of the injury (invidious discrimination). Our recent decision in *Pistillo* brings us a considerable distance toward resolution of the question before us. In *Pistillo*, the court considered whether settlement damages awarded in a suit for age discrimination under the ADEA, which sought back pay and reinstatement, were excludable under § 104(a)(2). The *Pistillo* court, reversing the tax court, found that damages awarded under the ADEA were "compensation for the *personal injury* [plaintiff] suffered as a result of his employer's invidious age discrimination." 912 F.2d at 150 (emphasis original). The court held, further, that "[plaintiff's] loss of wages—a substantial nonpersonal consequence of his employer's age discrimination—did not transform the discrimination into a nonpersonal injury." *Id.* Thus, the court held

that damages awarded in a settlement agreement under the ADEA were "damages for personal injury" excludable under § 104(a)(2).

Similarly, the court in *Rickel*, in rejecting the government's assertion that discrimination suits which sought damages for lost wages were based in contract rather than in tort as required by § 104 stated:

> [T]he duty of an employer to refrain from discrimination against employees on the basis of their age arises by operation of a statute. Society has made the moral and economic determination that as a matter of law it will not abide such discrimination. Such a duty arises even in the absence of a written employment contract and despite the existence of either contrary terms in such a contract or conflicting common law employment-at-will principles.

900 F.2d at 662. Thus, the *Rickel* court concluded that despite the fact that some of the compensation included in Rickel's settlement agreement was for back pay, the entire damage award was nonetheless excludable under § 104(a)(2). *Id.* at 664.

The government argues that excluding damages awards which include back pay from gross income for tax purposes will result in unfairness as employees will be better off than they would have been had the discrimination not occurred because the back pay award would not be subject to tax. While the government's position has some logical appeal, we have already addressed this concern in *Pistillo*:

> Given the result we reach today, Pistillo will have less federal tax liability than if he had not suffered age discrimination in the first place. The reality, however, as opposed to the hypothet-

> ical, is that Pistillo did suffer invidious age discrimination. Pistillo endured his employers' indignities, insults and age discrimination; suffered a dignitary tort; and was personally injured, . . . Pistillo is now entitled to receive federal tax treatment *equal* to that received by the typical tort victim who suffers physical injury and, as a result, receives a settlement award. *See Rickel*, 900 F.2d at 664 ("[T]he successful ADEA plaintiff is being treated no better . . . than the typical tort victim who suffers a physical injury. We see no reason to treat one personal injury victim any differently than another.").

Pistillo, 912 F.2d at 150 (emphasis original). Thus, a plaintiff who suffers the personal injury of discrimination and loses pay as a consequence will be treated identically to the victim of a physical injury whose damage award which includes lost wages is not taxable despite the fact that those wages would have been taxed had the injury not occurred. The fact that the settlement agreement in the instant case included a clause stating that the agreement was not an admission of discrimination, does not change the nature of the injury of discrimination or the logic of this court's analysis in *Pistillo*.

In sum, *Threlkeld* and its progeny require that for the purposes of § 104(a)(2), this court determine whether the injury is personal and the claim resulting in the damages is tort-like in nature. If the answer is in the affirmative, then that is "the beginning and end of the inquiry." *Threlkeld*, 87 T.C. at 1299. The damages resulting from such a claim are fully excludable under § 104(a)(2). At no point do we inquire into the nature of the damages involved.

Rather the narrow scope of our gaze is properly limited to the "origin and character of the claim, . . . and not to the consequences that result from the injury." *Threlkeld*, 87 T.C. at 1299. This court in *Pistillo* held that damages resulting from the settlement of an action for age discrimination under the ADEA were fully excludable as "damages on account of personal injury" under § 104(a)(2). The government has not provided, either in its briefs or in oral argument, and this court cannot discern, any principled way to distinguish the injuries arising from a claim for invidious age discrimination, and the claim for invidious sex discrimination before us today, except that these tort claims were brought under different federal statutes. In addition, the government was unable to demonstrate why injuries resulting from sex discrimination were not "personal" while other forms of non-physical tort injuries were "personal" for the purposes of § 104(a)(2) exclusion. *See, e.g., Threlkeld*, 87 T.C. at 1308, *aff'd* 848 F.2d 81 (6th Cir. 1988) (injuries to taxpayer's professional reputation due to a malicious prosecution excludable as personal under § 104(a)(2)); *Roemer*, 716 F.2d at 700 (compensatory damages received in a taxpayer's defamation suit were excludable as personal injuries under § 104(a)(2)); *Byrne v. Commissioner*, 883 F.2d 211, 216 (3rd Cir. 1989) (relying on *Bent* and *Roemer* to extend the § 104 exclusion to a retaliatory discharge claim under the Fair Labor Standards Act and a wrongful discharge claim under state law). Thus, we find that suits for unlawful discrimination under Title VII, like suits under the ADEA and other tort type suits, fall within the category of suits for injury to the person and that the damages resulting therefrom are properly excludable under § 104(a)(2).

Therefore, we hold that the withholding of federal taxes from the Title VII settlement damages giving rise to this taxpayer's action was improper. We REVERSE and REMAND for entry of an order consistent with this opinion.

WELLFORD, Senior Circuit Judge, dissenting:

I respectfully dissent from the reversal of the district court's decision in this case. The payments at issue received by plaintiffs should not be excludable from their gross income as determined by the district court.

Plaintiffs in their complaint specifically sought back pay allegedly denied them because of their sex. Plaintiffs' complaint referred at length to schedules of pay and asserted that classes of men allegedly doing work comparable to that done by plaintiffs received more pay for the allegedly comparable work. Presumably, the pay of these men was subject to income tax and FICA withholding. Plaintiffs sought, in short, equality of pay and then demanded back pay from TVA. The subject matter of the suit was pay for work performed, all subject presumably to the gross income definition of 26 U.S.C. § 61(a).

Plaintiffs claim that what they received was not equivalent to payment for services and thus not taxable, but the burden is upon them to show entitlement to an exclusion in light of the nature of their demand for *back pay*. *Commisisoner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). Plaintiffs claim that what they received was "damages" for "personal injuries," as in the case of *Pistillo v. Commissioner*, 912 F.2d 145 (6th Cir. 1990), rather than otherwise taxable earned income. I.R.C. § 104(a)(2).

Pistillo involved a jury award, later converted to settlement, including fees in an age discrimination case under 29 U.S.C. §§ 621-634.[1] The *Pistillo* plaintiffs' claim included (according to jury instructions) "liquidated damages, compensatory damages," and other benefits claimed to have been lost due to age discrimination. *Pistillo* relied, in part, upon *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), a first amendment termination case; on *Bent v. Commissioner*, 835 F.2d 67 (3d Cir. 1987), which was based on a first amendment claim and only partially on a lost wages claim; and on *Roemer v. Commissioner*, 716 F.2d 693 (9th Cir. 1983), which dealt with defamation damages. I believe that *Wulf*, *Bent* and *Roemer* are not comparable to the present sex discrimination lost wages or comparable worth case. I find them clearly distinguishable.

Wulf and *Bent*, in the first place, involved *wrongful terminations* based upon free speech considerations, a far cry from the claim in this case which involves no termination and a straightforward wage differential demand. *Roemer* involved a claim for defamation, defined as a personal injury claim under California law. I conclude that it likewise has no applicability to the instant controversy.[2] *Pistillo*'s reasoning that an age discrimination award for a termination which arose out of violation of an "individual right" and therefore is not taxable as a "personal

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[1] *Pistillo* reversed a Tax Court decision which held the jury award amount to be taxable based upon substantial authority from other circiuts.

[2] *Byrne v. Commissioner*, 883 F.2d 211 (3d Cir. 1989), extended the *Bent* and *Roemer* rationale to a retaliatory discharge claim under FLRA, still in no way comparable to the circumstances here.

injury" extends an exception from income taxation further than any previous case which dealt with an ADEA claim. I would not extend this rationale to a wholesale exemption of a wage benefits distribution attributable to a claimed wage differential as in this controversy.

The struggle to distinguish recoveries for personal injuries from all other recoveries began with the recognition that not all personal injuries are physical. *Hawkins v. Commisisoner*, 6 B.T.A. 1023 (1927); *Roemer*, 716 F.2d 693. Even if one accepts a recent inclination of some courts to characterize awards and accessions to wealth as damages for personal injuries rather than income, one must examine carefully the distinctions in those cases from the factual circumstances, as in the case at bar, in which the taxpayer obviously recovered amounts which would have been subject to income tax had they come to the taxpayer in the normal course. The majority would now extend the proposition that we look only to see whether the plaintiff has suffered an injury to personal dignity as a basis for a back pay recovery. *See Pistillo*, 912 F.2d at 150.

In *Threlkeld v. Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988), plaintiff claimed injury to professional reputation as part of a state law claim of malicious prosecution and the injury was measured by reference to lost business. The Tax Court determined that the recovery was due to a personal injury despite its link to economic ability. In reaching its decision the court stated that

> whether the damages received are paid on account of "personal injuries" should be the beginning and end of the inquiry. To determine whether the injury complained of is personal,

> we must look to the origin and character of the claim and not to the consequences that result from the injury.

87 T.C. at 1299 (citation omitted). The court did *not* say that all claims that include personal injury are necessarily fully about personal injury and therefore excludable from taxable income. It did *not* say that the consequences that flow from an injury are irrelevant to determining a claim's character and origin. To the contrary, the Tax Court in *Threlkeld* stated that the court

> must look to various factors, including the allegations in the . . . pleadings, the evidence adduced at trial, a written settlement agreement, and the intent of the payer. . . . Because of the multitude of situations involving the payment of damages for an allegedly personal injury, the most that can be said is that we will look to all of the facts and circumstances to determine whether the injury is, in fact, personal.

Id. at 1306.

The majority in the present case would extend what I feel is a flawed analysis in *Rickel v. Commissioner*, 900 F.2d 655 (3d Cir. 1990), and *Pistillo* beyond ADEA, again without critical analysis of the statute at issue. I find the analysis in *Thompson v. Commissioner*, 866 F.2d 709 (4th Cir. 1989), to be both logical and compelling:

> After analyzing the statutory scheme [of the Equal Pay Act and Title VII] we conclude that Thompson received the liquidated damages through prosecution of a tort-type claim for personal injuries. We conclude, however, that the claim for back pay was essentially a contractual

claim for accrued wages. Thus, the Tax Court correctly held the liquidated damages award excludable under section 104(a)(2), and the award of back pay includable in gross income.

. . . .

Thompson performed essentially the same work as her male co-workers for which she should have received equal pay. The back pay award was simply recovery for earned, but unpaid, wages which distinguishes her award of back pay from awards for lost wages or lost income in traditional personal injury/tort actions. She received compensation for services rendered whereas a tort plaintiff receives compensation for the inability to earn an income due to the tortious action of a defendant. *Threlkeld v. Commissioner*, . . . *Bent v. Commissioner*, 835 F.2d 67 (3d Cir. 1987), *Roemer v. Commissioner* . . . .

Id. at 712. This better reasoned analysis of the Fourth Circuit reveals that the term "contract" should be understood in a broad sense to include that which the Third Circuit in *Rachel* sought to exclude by rejecting the term "economic."

In *Metzger*, the Tax Court stated that its earlier decision in *Hodge v. Commissioner*, 64 T.C. 616 (1975), should not be read to imply that all recovery under Title VII is taxable but that the facts should be tested to determine the nature of a claim. 88 T.C. at 858. The court distinguished *Hodge* because the *Hodge* taxpayers received only back pay whereas that was not the case in *Metzger*. The court looked to the language in the settlement agreement, the underlying complaint and the evidence and arguments presented at trial to determine whether the recovery was meant to be back pay. 88 T.C. at 845-46. The court specifically stated that when a settlement agreement is not explicit about the character of a claim that factual evidence of the payor's intent is "most important" to determining the applicability of § 104. *Id.* at 857 (citing *Knuckles v. Commissioner*, 349 F.2d 610 (10th Cir. 1965)). It determined that the recovery was not back pay since there was no effort to calculate back pay and the settlement was meant to cover a number of claims not related to back pay.

The difference between the *Metzger* case and the case at bar seems apparent to me. Burke sought back pay in her complaint.[3] Payment under the settlement was linked to wages and taxes were withheld.[4] This is not a case in which back pay is a means of measuring loss due to a tort. Compensation for that loss, if it exists in this case, was not sought and arguably was not available under § 2000e. *See Boddy v. Dean*, 821 F.2d 346, 352 (6th Cir. 1987). Rather, this is a case in which the plaintiff "received in settlement [payment that] was includable in gross income because it was intended to compensate [Burke] for lost earnings. . . ." *Threlkeld*, 848 F.2d at 83 (distinguishing *Wolfson v. Commissioner*, 651 F.2d 1228 (6th Cir. 1981)). *See also Wolfson* (accepting applicability of clear error analysis to Tax Court determinations of excludability in personal injury cases).

I would AFFIRM the district court.

---

[3] The complaint requested an injunction against further discrimination and an "order awarding back pay to all affected female employees . . . ."

[4] The majority opinion finds some significance in conduct, which it describes as (1) TVA not taxing its direct payment to Hutcheson; and (2) not taxing monies left over as undeliverable which were turned over to the union. Each check, however, clearly stated the amount *withheld as taxes* making the payor's intent clear.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

CIV-1-88-508

THERESE A. BURKE, CYNTHIA R. CENTER, AND LINDA G. GIBBS, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM

[Filed Mar. 20, 1990]

This is a suit to obtain refunds from the Commissioner of Internal Revenue of various amounts of money withheld as income taxes and as Social Security (Federal Insurance Contributions Act, 26 U.S.C. §§ 3101 *et seq.* ("FICA")) assessments from damages paid to each plaintiff by the Tennessee Valley Authority ("TVA") in settlement of a prior law suit. The question presented is whether the damages were excludable from income under section 104(a)(2) of the Internal Revenue Code. The case has been submitted for decision on the record (*see* Court File Nos. 13 at 2; 15 at para. 2).

Findings of Fact

The plaintiffs in this case were employed by the Tennessee Valley Authority ("TVA") and were members of the Office and Professional Employees Inter-

national Union, AFL-CIO ("OPEIU"). The plaintiffs were beneficiaries of the relief sought in *Hutcheson v. Dean*, Civil Action No. 3-85-119 (E.D. Tenn.) ("*Hutcheson*"), filed by various TVA employees and the OPEIU against the TVA under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (*see* Court File No. 15 at paras. 3, 8-9).[1] The complaint in *Hutcheson* made the following allegations:

> 11. As part of its salary and wage structure, . . . TVA maintains some six separate pay schedules for employees . . . . One of these schedules is known as and identified as the Clerical and General Services Schedules (SB), hereinafter referred to as the SB schedule. The SB schedule . . . is predominantly staffed by women . . . .
>
> 12. TVA maintains an Administrative Schedule (S), . . . an Engineering and Scientific Schedule (SD), . . . [and] an Aide and Technical Schedule (SE) . . . .
>
> 13. Schedules SA, SD, and SE are staffed predominantly by men . . . .
>
> 14. TVA maintains a Custodial Schedule (SF) . . . [and] a Public Safety Schedule (SG).

---

[1] The plaintiffs in *Hutcheson* sought certification as a class action. The Court denied class certification, saying "the Court does not believe a class action is required in order to give the relief requested. The presence of OPEIU in this action insures that the interests of [the class] will be protected" (Court File No. 8, exhibit 3 at 4). The Court noted as well that it had another reason to deny class status: "it would be inequitable to give the relief requested only to *female* SB schedule employees. If discrimination has occurred against female employees, presumably the few male employees holding clerical positions have also suffered by their identification with the class" (*id.*).

. . . Both SF and SG schedules are staffed predominantly by men.

15. The number of women in the SB schedule greatly exceeds the total of men in the SB, SF, and SF schedules.

16. The number of men in the SA, SD, and SE schedules greatly exceeds the total or women in the SB schedule.

17. Plaintiffs bring this action on behalf of . . . all female SB schedule employees of TVA as of August 31, 1981, to the present. . . .

18. . . . Plaintiffs allege that there exists on the part of the TVA a policy and practice of unlawful, gender-based discrimination with respect to salary, emanating from a central administration and injuring all members of the class . . . .

. . . .

21. In years prior to 1981, TVA undertook wage and salary surveys among various selected private employers in the geographical area known as the vicinity . . . in arriving at wages for [TVA] employees . . . . When such surveys were completed, . . . [the survey results were used in bargaining] for wages and salaries.

22. Beginning sometime in late 1979 or early 1980, and continuing into 1981, defendants began to undertake a plan, program, and campaign to limit, restrict, confine and check wage and salary increases, focusing such plan, and campaign upon employees in the SB schedule, which made up the majority of employees affected by this program[, . . . by changing] the definition of vicinity that had been used in all prior years [for wage surveys]. . . .

23. Defendants knew, or should have known, in 1980 and at all times thereafter, that adoption of [certain aspects of this plan] would result in a lowering of wage schedules for the SB schedule.

. . .

24. . . . TVA unilaterally selected employers to be surveyed . . . for the SB schedule and the SF and SG schedules, and did make . . . salary surveys. The selection of these particular employers was designed and calculated to result in a reduced salary schedule for the SB schedule, and did result in such a reduced salary schedule for employees in the SB schedule.

25. In 1981, TVA continued its past practices of using a regional area survey for the SA, SD, and SE schedules, and its unilateral selection of employers produced increases in the salaries of employees in the SA, SD, and SE schedules, made up predominantly of male employees.

26. Utilizing the threat of terminating the [collective bargaining agreement between TVA and all employees], terms and conditions resulting in decreases in schedule pay for the vast majority of employees on the SB Schedule were imposed . . . by TVA in 1981. . . . Those employees on the SB, SF, and SG schedules . . . did not receive the increase in schedule pay similar to those that were awarded to the SA, SD, and SE schedules . . . .

27. Defendants knew, or should have known, that their unilateral changes [in regard to pay schedules] would result in increases for male-dominated schedules . . . and that these acts would result in decreases for female-dominated schedules . . . .

28. Defendants' acts and conduct . . . [were] intended to and did result in disparate treatment of its female employees in their rates of pay in violation of Title VII of the Act.

29. In the alternative, and in addition to disparate treatment of women, defendants' [changes to] pay schedules had a disparate impact on women, in further violation of Title VIII of the Act.

(Court File No. 8, exhibit 1: copy of Second Class Action Complaint). The plaintiffs sought the following relief:

> plaintiffs pray for judgment against defendants and for an order of this Court restraining and enjoining defendants from further discriminating against women in the SB schedule in wages and salaries and for a further order awarding back pay to all affected female employees in the SB schedule in an amount found to be just and proper sufficient to eliminate discrimination, for costs, for attorney's fees, and for such other relief as may be warranted in the premises.

In ruling upon a motion for summary judgment filed by the defendants in *Hutcheson*, the Court said that the plaintiffs had "made a *prima facie* case of disparate impact by showing that TVA adopted a facially neutral course of conduct (by changing the method it used to fix salary schedules for certain employee groups) which had a significantly adverse impact on female employees" (Court File No. 8, exhibit 4 at 3). This showing was deemed sufficient to shift the burden to the defendants to articulate a legitimate, nondiscriminatory reason for TVA's actions (*see* Court File No. 8, exhibit 5 at 2). The

Court further noted that "the plaintiffs have produced significant evidence from which discriminatory intent might be inferred by the trier of fact" (Court File No. 8, exhibit 4 at 3).

On March 13, 1987, "wish[ing] to finally settle and resolve the complaint" (Court File No. 8, exhibit 6 at 2), the parties in *Hutcheson* signed a Settlement Agreement ("Agreement"). The terms of the Agreement were as follows:

> 1. Nothing in this agreement is, or shall be construed as, an admission by defendants that TVA . . . has discriminated on the basis of sex against Hutcheson or any present or former TVA employee in the [group] represented by OPEIU. . . .
>
> . . . .
>
> 3. TVA shall pay the sum of $4,200 to [plaintiff] Hutcheson. . . .
>
> . . . .
>
> 5. . . . TVA will pay at OPEIU's direction a sum not to exceed $5,000,000, less any taxes which TVA may be required to pay because it is the employer of any person whom OPEIU may designate to receive a portion of said sum. OPEIU has determined that such amount will be paid to current employees of TVA represented by OPEIU (. . .), who have performed work on the SB schedule between June 28, 1981, and March 10, 1987. The amounts will be based upon pay rates and length of service in the SB schedule during the above period. . . . TVA will have no liability or responsibility to OPEIU with respect to TVA's actions hereunder, and OPEIU will defend, indemnify, and hold harmless TVA . . .

against any liability for any claims, demands, actions, causes of action, payments, backpay, damages, fees, costs, or judgments, on behalf of any person (. . .), arising out of or related in any way to this paragraph of this agreement.

This agreement is made for the purpose of resolving litigation and for no other purpose. . . . Any payments made pursuant to paragraph 5 of this agreement . . . are deemed and considered by OPEIU as litigation benefits provided for those TVA employees on the date of execution of this agreement who are represented by OPEIU on such date and for no other purpose.

. . . .

9. This agreement is the full and final settlement of the pending complaint, as amended. . . . In consideration of the foregoing payments and agreements, Hutcheson and OPEIU hereby release, acquit, and forever discharge TVA, its Board of Directors, agents, officers, and employees from any and all actions, causes of action, claims, demands, damages, costs, expenses, compensation, costs, attorney fees, and liability on account of or in any way related to or arising out of any matters alleged in the administrative class complaint or in the judicial complaint, as amended. . . .

On May 6, 1987, the Agreement was amended as follows:

> 5. . . . TVA will pay at OPEIU's direction a sum not to exceed $5,000,000, less any taxes which TVA may be required to pay because it is the employer of any person whom OPEIU may designate to receive a portion of said sum. OPEIU has determined that such amount will be paid to all persons who were employed on the SB schedule at any time between June 28, 1981, through and including March 10, 1987. . . .

(Court File No. 8, exhibit 7). George E. Barrett, who was a principal attorney representing the plaintiffs in *Hutcheson*, states that "[a]t no time during [settlement] discussions was there any reference by any of the participating attorneys that any payment to and through OPEIU would be considered as back pay" (Court File No. 8 at para. 14). TVA determined, however, that it "would not distribute any money to any individuals unless income tax withholding and FICA moneys were deducted" (*id.* at para. 16).

The various payments were made to the various plaintiffs in *Hutcheson* and the various deductions were made from those payments. Specifically, it has been stipulated (Court File No. 15 at paras 9-12) that plaintiff Therese A. Burke was entitled to $764.94 of the settlement proceeds; plaintiff Cynthia R. Carter was entitled to $927.55; and plaintiff Linda G. Gibbs was entitled to $572.95. The TVA withheld $152.99 federal income tax and $54.69 FICA tax from the payment to plaintiff Burke, $185.51 federal income tax and $66.32 FICA tax from the payment to plaintiff Center, and $114.39 federal income tax and $40.97 FICA tax from the payment to plaintiff Gibbs. The plaintiffs then filed this law suit to recover the amounts withheld as taxes.

Discussion

Section 61(a) of the Internal Revenue Code [2] provides that gross income includes "all income from whatever source derived," unless otherwise provided. 26 U.S.C. § 61(a) (1988). Section 104(a)(2) provides (otherwise) that gross income does not include "the amount of any damages received (whether by suit or agreement and whether as lump sum or as periodic payments) an account of personal injuries or sickness . . . ." 26 U.S.C. § 104(a)(2) (1988). The pertinent tax regulations provide that "[t]he term 'damages received (whether by suit or agreement)' means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 C.F.R. § 1.104-1(c).

As pertinent to the instant case, "the essential element of an exclusion under section 104(a)(2) is that the income involved must derive from some sort of tort claim against the payor." *Glynn v. Commissioner*, 76 T.C. 116, 119 (1981), *aff'd*, 676 F.2d 682 (1st Cir. 1982); *see also Byrne v. Commissioner*, 90 T.C. 1000 (1988); *Bent v. Commissioner*, 87 T.C. 236, 244 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1988). Thus, the Court "must look to the nature of the underlying injury to determine excludability under section 104(a)(2)." *Threlkeld v. Commissioner*, 848 F.2d

[2] Since all events transpired prior to the recent amendments to the Internal Revenue Code, all references are to the Internal Revenue Code of 1954, as amended and in effect for the year in issue: 1987.

81, 84 (6th Cir. 1988). In addition, the law is clear that the tax consequences of an award for damages depend upon the nature of the litigation and on the origin and character of the claims adjudicated, and not on the validity of those claims. *Bent v. Commissioner*, 87 T.C. 236 (1986); *Glynn v. Commissioner*, 76 T.C. 116, 119 (1981), *aff'd*, 676 F.2d 682 (1st Cir. 1982) (table); *Seay v. Commissioner*, 58 T.C. 32, 36-37 (1972).

In this case, the plaintiffs were beneficiaries of a prior suit (*Hutcheson*) brought against the TVA for violations of Title VII of the Civil Rights Act of 1964. Such a damage action "sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (dealing with the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*). Title VII provides, in pertinent part, that:

> [i]t shall be an unlawful employment practice for an employer—
>
> (1) to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [sic] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [sic] status

> as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). The injuries for which relief is sought under Title VII are "personal injuries." *Metzger v. Commissioner*, 88 T.C. 834 (1987), *aff'd*, 845 F.2d 1013 (3d Cir. 1988) (table). "[S]ex discrimination actions in general are tort or tort-type actions and damages awarded for violation of that right are damages for personal injuries." *Thompson v. Commissioner*, 866 F.2d 709, 712 (4th Cir. 1989); *see also Davis v. Passman*, 442 U.S. 228, 235 n.10 (1979); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690-93, n.13 (1979); *compare Monongahela Navigation Co. v. United States*, 148 U.S. 312-26 (1893).[3]

Title VII provides for the following remedies:

> [i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may *enjoin* the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, *reinstatement or hiring* of employees, *with or without back pay . . . or any other equitable relief* as the court deems appropriate. . . . Interim earnings or amounts earnable with

[3] *See also Threlkeld v. Commissioner*, 87 T.C. 1294, 1301 (1986) ("Exclusion under section 104 will be appropriate if compensatory damages are received on account of any invasion of the rights that an individual is granted by virtue of being a person in the sight of the law."); *Black's Law Dictionary* 1335 (5th ed. 1979) (a tort action is one for "a direct invasion of some legal right of the individual," independent of a contract).

> reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e-5(g) (emphasis added). It is well established in this Circuit that prevailing plaintiffs in Title VII actions are entitled to equitable relief (which may, in the Court's discretion, entail front pay,[4] *see Gutzwiller v. Fenik*, 860 F.2d 1317, 1333-34 (6th Cir. 1988); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1158-60 (6th Cir. 1985)), coupled with back pay and fringe benefits,[5] but are not entitled to compensatory or punitive damages.[6] *Mitchell v. Sea-*

[4] "[F]ront pay is an award of future earnings to make a victim of discrimination whole." *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1346 (9th Cir. 1987), *cert. denied*, 469 U.S. 1181 (1985). More precisely, it is "designed to compensate the plaintiff for economic losses that have not occurred as of the date of the court decree, but that may occur as the plaintiff works toward his or her rightful place." Note, *Front Pay—Prophylactic Relief under Title VII of the Civil Rights Act of 1964*, 29 Vand. L. Rev. 211, 212 (1976).

[5] "Fringe benefits include sick and vacation pay and mileage expenses which an employer would have paid the employee in the normal course of business." *Mitchell v. Seaboard System R.R.*, 883 F.2d 451, 453 (6th Cir. 1989) (citing *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984)).

[6] "[C]ompensatory damages are those which repay an individual for out-of-pocket losses and less tangible losses, such as harm to reputation and personal humiliation." *Mitchell*, 883 F.2d at 453 (citing *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986)). Punitive damages are those

> awarded to the plaintiff over and above what will barely compensate him [sic] for his . . . loss, where the wrong done to him was aggravated by circumstances or violence, oppression, malice, fraud, or wanton and wicked

board System R.R., 883 F.2d 451, 452-53 (6th Cir. 1989); *Body v. Dean*, 821 F.2d 346, 352 (6th Cir. 1987); *accord Bennett v. Carroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, —— U.S. ——, 103 L.Ed.2d 201 (1989); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 137-38 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986); *Patzer v. Bd. of Regents of Univ. of Wisconsin System*, 763 F.2d 851, 854 n.2 (7th Cir. 1985); *Walker v. Ford Motor Co.*, 684 f.2d 1355, 1363-64 (11th Cir. 1982) (and cases cited); *Shah v. Mt. Zion Hosp. and Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981); *see generally* B. Schlei & P. Grossman, *Employment Discrimination Law*, 1434-36 (2d ed. 1976); D. Cathcart & R. Ashe, eds., *Five-Year Cumulative Supplement to Schlei & Grossman's Employment Discrimination Law, 2d ed.*, 533-35 (1989). Thus, as a general proposition, "[e]mployers who discriminate in the payment of wages are liable under . . . Title VII for back pay in the amount of the differential between the wages received and the wages which would have been paid absent the discrimination." *Thompson v. Commissioner*, 866 F.2d 709, 711 (4th Cir. 1989) (citing 29 U.S.C. § 216(b); 42 U.S.C. § 2000e-5(g)). Payments received of unpaid salary or wages nevertheless are not excludable under section 104(a)(2). *Hodge v. Commissioner*, 64 T.C. 616, 619 (1975); *see also Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Rickel v. Commissioner*, 92 T.C. 510 (1989); *Thompson*, 89 T.C. at 646-47.

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conduct on the part of the defendant, and are intended . . . [in part] to punish the defendant for his evil behavior or to make an example of him . . . .

Blacks Law Dictionary 352 (5th ed. 1979).

In the case of settlement of a tort case, however, the court "is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Local 93, Int'l Ass'n of Fire Fighters v. City of Cleveland*, 478 U.S. 501, 525 (1986). Thus, damages received as a result of settlement of a Title VII suit may be excludable under section 104(a)(2), *Metzger*, 88 T.C. at 858, to the extent that the parties agreed to a settlement which did not entail payment of back pay.

In such a case, excludability depends "on what was the injury complained of, and the loss of income may merely be 'an evidentiary factor' or 'the best measure of loss'." *Metzger*, 88 T.C. at 858 (citations omitted). As the Tax Court noted in *Thompson v. Commissioner*, 89 T.C. 632 (1987):

> Since . . . a sex discrimination suit may be a suit for a personal injury, it is necessary to decide whether the amount of liquidated damages received by petitioner was received as compensation for this personal injury or was received as part of the back pay award.
>
> The fact that by statute this award is measured by the amount of back pay due to petitioner in our view is not controlling. . . . Liquidated damages are awarded where the employer cannot show that the sex discrimination was in good faith. In our view, sex discrimination which was not in good faith is a personal injury and the liquidated damages, even though measured by the back pay due, are nevertheless paid as damages for a personal injury. . . . [L]iquidated damages [are] compensatory rather than penal in nature and [are] intended to compensate for intangible

> losses difficult to measure, but nevertheless the consequences of unfair wages. . . . Other than being measured by the amount of back pay, . . . liquidated damages are not directly related to back pay.

Another way of making a determination whether the payments were for unpaid salary or wages is to ask, "in lieu of what were the damages awarded?" *Church v. Commissioner*, 80 T.C. 1104, 1107 (1983); *Fono v. Commissioner*, 79 T.C. 680 (1982), *aff'd*, 749 F.2d 37 (9th Cir. 1984) (table); *Yates v. Commissioner*, 58 T.C. 961, 972 (1972), *aff'd*, 480 F.2d 920 (1973) (table); *see also Raytheon Production Corp. v. Commissioner*, 144 F.2d 110-113 (1st Cir. 1944). When the settlement agreement does not expressly state that settlement payment is made for personal injury, then the most important factor in determining whether section 104(a)(2) exempts the payment is "the intent of the payor" in making the payment. *Knuckles v. Commissioner*, 349 F.2d 610, 613 (10th Cir. 1965); *Byrne*, 90 T.C. at 1007; *Metzger*, 88 T.C. at 847-48; *Fono v. Commissioner*, 79 T.C. 680, 694 (1982), *aff'd*, 749 F.2d 37 (9th Cir. 1984) (table); *Glynn v. Commissioner*, 76 T.C. at 120.

In this case, *Hutcheson* was settled and it is represented that "[a]t no time during [settlement] discussions was there any reference by any of the participating attorneys that any payment to and through OPEIU would be considered as back pay" (Court File No. 8 (affidavit of George E. Barrett) at para. 14). It is not dispositive, however, that the phrase "back pay" was not mentioned during settlement negotiations, since the *Hutcheson* complaint makes it clear that the very core of the case was recovery of wage deficiencies. In fact, the entire complaint refers *only* to wage discrimination (*see* Court File No. 8, exhibit 1 at paras. 18 (alleging "a policy and practice of unlawful, gender-based discrimination with respect to salary"); 23 (alleging that "[d]efendants knew, or should have known . . . [that their actions] would result in a lowering of wage schedules for the SB schedule"); 28 (alleging "[d]efendants' acts and conduct . . . [were] intended to and did result in disparate treatment of its female employees in their rates of pay"); 29 (alleging that "disparate treatment of women . . . had a disparate impact on women")).

More importantly, the Settlement Agreement states that individual allocation of monies received from the TVA in settlement of the suit "will be based upon pay rates and length of service in the SB schedule" (Court File No. 8, exhibits 6 & 7 at para. 5). When coupled with the fact that the complaint refers only to wage discrimination, it is more apparent that the payments dispersed by TVA to the various plaintiffs in *Hutcheson* were not merely "measured by" back wages allegedly due to the plaintiffs in *Hutcheson*, *see Thompson*, 89 T.C. at 646-48; *Metzger*, 88 T.C. at 858, but were payments "in lieu of" wages not paid under schedules derived from the allegedly sexually biased regional studies, *see Church*, 80 T.C. at 1107. *See Hodge v. Commissioner*, 64 T.C. 616, 620 (1975); *Sparrow v. Commissioner*, T.C. Memo 1989-315 (1989).

Finally, the plaintiffs in *Hutcheson* accepted language in the Settlement Agreement that "TVA will pay . . . a sum not to exceed $5,000,000, less any taxes which TVA may be required to pay because it is the employer of any person whom OPEIU may designate to receive a portion of said sum" (Court File

No. 8, exhibits 6 & 7 at para. 5). Thus, the plaintiffs in *Hutcheson* tacitly accepted that the sums to be received under the Settlement Agreement were in the nature of back pay. Given all these facts, "there is nothing . . . that converts a claim for back pay, because an individual has been underpaid for the work he [sic] has done, into a claim for damages for a personal injury merely because the suit which involves such a claim may also have a tort-type action for personal injuries." *Thompson*, 89 T.C. 632.

In conclusion, the facts indicate that the settlement in *Hutcheson* entailed TVA's payment of partial back pay to the plaintiffs, in direct satisfaction of their claims and allegations in their complaint. *See Hodge*, 64 T.C. at 619. Since the disbursements to the *Hutcheson* plaintiffs under their Settlement Agreement were back pay, they were not excludable from gross income under section 104(b)(2). For this reason, the plaintiff's motion for summary judgment (Court File No. 6) will be DENIED. Since the issues are clear and since the case has been submitted for decision on the record, the Court, *sua sponte*, will GRANT summary judgment to the defendant and this case will be DISMISSED.

An order will enter.

/s/ R. Allan Edgar
R. ALLAN EDGAR
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5607

THERESE A. BURKE; CYNTHIA R. CENTER;
LINDA G. GIBBS, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

On Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga

Before: Merritt, Chief Judge; Jones, Circuit Judge;
Wellford,* Senior Circuit Judge

JUDGMENT

[Filed Apr. 5, 1991]

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is reversed

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* The Honorable Harry W. Wellford assumed senior status on January 21, 1991.

and remanded for entry of an order consistent with the opinion.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green, Jr.
LEONARD GREEN
Clerk

A True Copy.

Attest:

/s/ [Illegible]
Deputy Clerk

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